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No. 88-856

In The

Supreme Court of the United States

October Term, 1988

PETER CHEMA,

Petitioner,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

This case of individual rights, immunities and liberties cannot be recast in the mold of collective guilt by Respondents' recounting of its lengthy procedural history.[1] The issue in the instant case is not the liability of

[1] Although recognized by the ACLU/NYCLU as significant, ACLU/NYCLU Brief, p. 23, the Government and NAACP ignore the particular position of Councilman Chema. Councilman Chema voted against the January 28, 1988 Consent Decree, as he did the Long Term Plan, June 28, 1988, and Affordable Housing Ordinance, August 1, 1988.

the City of Yonkers nor the appropriateness, generally, of the remedial measures ordered. Rather, it is whether Councilman Chema's legislative immunity and constitutional rights can be or need be subordinated to the goal of achieving desegregation.

The contempt sanction here challenged was imposed solely as the result of the July 26, 1988 order to vote, Appendix p. 446, not for disobedience of the Housing Remedy Order, the Long Term Plan Order, the Consent Decree, nor any other court orders, judgments or events which preceded it. Government Brief, pp. 19, 21, 23. The 400-page District Court opinion finding racial discrimination by the City does not state anywhere that Councilman Chema did anything unlawful or improper. *United States v. Yonkers Bd. of Education*, 624 F. Supp 1276 (S.D.N.Y. 1985). He was not even in office in 1986 when the District Court entered the Housing Remedy Order. In office only two weeks, Councilman Chema, on January 19, 1988, was faced with threats of contempt, restriction on his freedom to travel and removal from office by the District Court in an attempt to coerce the Consent Decree.[2] The record is clear and uncontroverted that Councilman Chema always

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[2] That coercion was effective as to a majority of the members of the Yonkers City Council but Councilman Chema voted his conscience, and voted "no," on the resolution approving the Consent Decree.

The Government cannot now challenge the Court of Appeals' factual finding that Yonkers entered into the Consent Decree only after being threatened by the District Court with contempt sanctions. Fed. R. Civ. P. 52(a) prohibits an appellate court from setting aside a finding of fact "unless clearly erroneous," *Anderson v. Bessemer City*, 470 U.S. 564, 573, 580-81 (1985), "even though convinced that had it been sitting as trier of fact, it would have weighed the evidence differently." *Amadeo v. Zant*, 486 U.S. 214, 108 S. Ct. 1771, 1777 (1988), *quoting Anderson v. Bessemer City*, 470 U.S. at 574.

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showed respect towards the District Court in advocating a comprehensive, not piecemeal, solution to providing decent housing for those who had just voted him into office, and he said so publicly at council meetings:

> We need money on the West Side of town to fix up debilitated and severe housing conditions that exist. The decree serves no one well.
>
> * * *
>
> I do not act out of disrespect for the federal court, but out of respect for the Constitution, which I believe is the supreme law of the land.

Appendix pp. 452, 507. The NAACP falsely accuses him of "years of resistance" and the "excesses of a mob," NAACP Brief, pp. 12, 14, with no factual basis in the record.

Councilman Chema asserts in this case before this Court his position that a constitutional end does not justify resort to unconstitutional means.

ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT UTILIZING THE LEAST INTRUSIVE MEANS.

Respondents appear to take issue with the correct statement of the law by the Court of Appeals that a court is obliged to use the " 'least possible power adequate to

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The Court of Appeals' finding that Yonkers entered into the Consent Decree only after the District Court had threatened contempt sanctions is well-supported by the record, Appendix pp. 176, 182-83, and conceded by the NAACP: "[t]he district court clearly . . . threatened the City with contempt on several occasions before the City Council voted to adopt the Consent Decree," but justifies the court's threats on grounds that they "achieved their objective," NAACP Brief, p. 30. In other words, the ends justified the means.

the end proposed' " to effect its orders, including the selection of contempt sanctions, *United States v. City of Yonkers*, 856 F.2d 444, 454 (2d Cir. 1988), *citing Shillitani v. United States*, 384 U.S. 364, 371 (1966) [quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 61, 69 (1821)]. Yet they provide no precedent, nor any reasoning, which is persuasive.

Respondents make two fundamental errors in their analysis of the "least intrusive means" principle. First, they assume that the action was properly one for contempt (*see, e.g.*, Government Brief at 44), which begs the question of whether compelling Councilman Chema to vote for a specific local ordinance, on pain of contempt, was the appropriate remedial measure, which is precisely the issue raised in this case. Second, they assume that the goal was enactment of the Affordable Housing Ordinance (Government Brief at 45).[3]

Both assumptions are incorrect. First, the issue raised by Councilman Chema is whether an order to a legislator to vote "yes" on a pending bill, backed up by the contempt power, was the appropriate means to achieve the constitutional remedial goal. Second, that goal was desegregating housing in Yonkers, and the means to achieve that goal was to build public housing and subsidized affordable housing in predominantly white neighborhoods. The adoption of the Affordable Housing Ordinance was merely a subsidiary, probably no more than a tertiary, means to that goal. And the use of the contempt power was a means to that means. As such, Councilman Chema claims that the use of the contempt power was unnecessarily intrusive.[4]

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[3] The Government waffles a bit, describing this as the "immediate end proposed," without stating what was, in its view, the ultimate goal of the remedy.

[4] Councilman Chema does not claim that he is free to disregard a lawful court order, but rather that the District Court's orders were unlawful because the court exceeded its

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The other fundamental error made by Respondents is mistaking the constitutional rights in conflict in *this* case. At issue on the one hand are the rights of minority group members to non-segregated housing; on the other hand are the First Amendment free speech rights of Councilman Chema and the legislative immunity of local legislators. The District Court, in exercising its undeniable *power* to enforce its orders, was required to be mindful of these rights of Councilman Chema, and to use means to "get housing built" which would not infringe those rights unless no other means were effective. We contend that a federal court must use, to borrow terms from strategic

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power to issue them, a claim he clearly has the right to raise. *See United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, ___ U.S. ___, 108 S. Ct. 2268 (1988) (one has a right to attack a civil contempt citation for refusal to obey a subpoena on the ground that the court lacked subject matter jurisdiction); *United States v. United Mine Workers*, 330 U.S. 258, 294-95 (1947); *United States v. Thompson*, 319 F.2d 665, 668 (2d Cir. 1963) ("the power and jurisdiction of the court to issue a subpoena may be raised for the first time in a proceeding to punish for contempt"). Respondents never questioned this below. It was entirely appropriate for Councilman Chema, as "a matter of conscience," to test the validity of the July 26th order by submitting to the civil contempt sanction, especially where, as here, he raises an issue of the "excessive use of judicial power." *See United States Catholic Conference v. Abortion Rights Mobilization Inc.*, 108 S. Ct. at 2271. Moreover, this Court has supervisory power to regulate the exercise of the contempt power. *Young v. United States*, 481 U.S. 787, 107 S. Ct. 2124 (1987), *citing Cheff v. Schnackenberg*, 384 U.S. 373, 384 (1966); *see also Cooke v. United States*, 267 U.S. 517, 536 (1925), *citing Randall v. Brigham*, 7 Wall. 523, 540 (1869). We agree with the Government's stated position that " . . . the appellate process provides a safeguard against unlawful or unnecessary remedial requirements," Government Brief, p. 33, and this appeal is the ultimate step in that process.

military planning, a "graduated response," rather than "massive retaliation."

The Government makes an extremely important concession in this regard when it states, "In retrospect, it appears that the sanctions against the City was the principal factor in securing compliance." (Government Brief, n. 55). That is precisely the point; rather than using hindsight to regret "overkill," the District Court should have used foresight, and *first* use its power against the City, which was the party found liable, not against the constitutional rights of individuals who were neither parties nor liable. *See* Appendix, pp. 436-38. Speculation by the Government that any remedial measure other than contempt would have been ineffective, Government Brief at 46, is not a substitute for constitutional principles judiciously applied. We submit that the fundamental principle of our jurisprudence (tracing back, perhaps, to the biblical teaching of the story of Isaac and Jacob) is the use of measured and graduated sovereign power to achieve a legal goal by the least punitive method available.

The cases cited by the Government support, rather than negate, Councilman Chema's position. *United States v. Paradise*, 480 U.S. 149 (1987), shows that in most situations, direct action by the court is preferable to the use of penal or quasi-penal compulsion. *Wise v. Lipscomb*, 437 U.S. 535 (1978) stands for the proposition that courts can, in extreme cases, act when the legislature fails to act, not for a principle authorizing judges to direct legislators how to vote. This Court recognized in *Reynolds v. Sims*, 377 U.S. 533 (1964) that, while the primary responsibility may rest with the legislature, the appropriate remedy, if the legislature fails to act to correct violations of the Constitution, is for the court itself to act.

The principle that remedial measures should intrude as little as possible on the rights of others derives not only from the contempt cases cited by the Court of Appeals, but from other decisions by this Court and lower federal courts in which federal courts have been called upon to weigh competing constitutional rights of

disparate parties. Even when protecting the Fourteenth Amendment rights of one party, courts must safeguard the constitutional rights of the other parties and non-parties. To accomplish this, remedial measures are to be no broader than necessary to correct the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971). In *Rizzo v. Goode*, 423 U.S. 362, 380 (1976), this Court wrote, "The principles of federalism which play such an important part in governing the relationship between federal courts and state governments [apply] where injunctive relief is sought against those in charge of an executive branch of an agency of state government." The same principles apply with even greater force to employing the contempt power to compel a legislative body or its members to perform a legislative function, or to compel speech by any person.

The Fifth, Eighth and Ninth Circuits, and even the Second Circuit in this case, 856 F.2d at 454, have applied this principle in cases involving violations of constitutional rights and remedies for those violations. Brief for Councilman Chema, pp. 20-21. Respondents simply ignore the teaching of these cases, which recognize two important constitutional principles: avoidance, when possible, of confrontation between federal judicial power and the rights of state and local governmental units (indeed, *Wise v. Lipscomb, supra*, cited by the Government, supports this principle) and the goal of avoiding or minimizing conflict between competing constitutional rights or privileges.

In this case, the District Court had alternatives that would not infringe Councilman Chema's rights. For example, the District Court could have appointed a "fair housing commission" with properly circumscribed powers to carry out the long-term housing order pursuant to Fed. R. Civ. P. 70, to achieve the end of building

affordable, desegregated housing.[5] Instead, the court took the *most* constitutionally intrusive course of action by ordering Councilman Chema how to vote, thereby unnecessarily depriving him of his First Amendment rights and his rights as an elected legislator, thus setting the stage for an unnecessary constitutional confrontation.

Rather, the District Court was required to use those means at its disposal to achieve the remedial goal of the affordable housing plan which were far less intrusive upon Councilman Chema's individual rights than a coerced vote backed up by the contempt power.

II. THIS COURT'S PRECEDENTS AND PUBLIC POLICY SUPPORT THE APPLICATION OF ABSOLUTE LEGISLATIVE IMMUNITY.

In arguing against the applicability of legislative immunity to Councilman Chema, the Government and the NAACP both overread, misread and misapply this Court's and other courts' precedents. They ignore the roots of the immunity doctrine which may be traced back to the parliamentary struggles of 16th and 17th century England. They wrongly assume the lawfulness of the District Court's July 26 and August 2, 1988 orders, both of which violate Article III, principles of federalism, comity and separation of powers, and exceed the constitutional limitations on equitable remedial powers articulated

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[5] Councilman Chema does not contend that the District Court had the power to enact the Ordinance itself, Government Brief, p. 42; ACLU/NYCLU Brief, p. 37, but that the court could have superseded Yonkers' existing zoning laws by allowing the housing to be built *as if* Yonkers' law permitted its construction, or by preempting Yonkers' law. The judicial power of the courts of the United States does not include the power to enact any statute, law or ordinance. Court enactment of the Affordable Housing Ordinance was not a valid alternative for the District Court.

by this Court. Finally, both speciously argue that considerations of public policy do not support immunity in this case. This Court's precedents, public policy considerations and history of the immunity doctrine, together with the virtues of federalism, comity and separation of powers, support legislative immunity for Councilman Chema.

At the outset, the Government's and NAACP's attempts to argue the inapplicability of legislative immunity by noting that *Tenney v. Brandhove*, 341 U.S. 367, *reh'g denied*, 342 U.S. 843 (1951), and subsequent cases, including several decisions by the various Courts of Appeals, involved private actions under 42 U.S.C. § 1983, Government Brief, pp. 28-30; NAACP Brief, p. 22, are not persuasive. First, before and after *Tenney*, this Court has applied the principle of legislative immunity in cases not arising under Section 1983. *See, e.g., Gravel v. United States*, 408 U.S. 606 (1972); *Kilbourn v. Thompson*, 103 U.S. 168 (1881). Although the watershed case of *Tenney* involved a private damage action brought under 8 U.S.C. § 43, the predecessor statute to 42 U.S.C. § 1983, the rationale and reach of the Court's broad analysis was not in any manner confined by that circumstance.

Tenney supports the application of legislative immunity in this case. Both the Government and the NAACP fail to recognize that legislative immunity long antedates *Tenney*.[6] Indeed, the *Tenney* Court traced the roots of "[t]he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings" to the English parliamentary struggles, in

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[6] In *Barr v. Matteo*, 360 U.S. 564, 579 (1959), the Court recognized that "absolute legislative privilege dates back to at least 1399." Historically, the privilege was "essential to *every* free council or legislature." T. May, *The Law, Privilege, Proceedings and Usage of Parliament*, 47 (14th ed. 1946) (emphasis added).

which the doctrine of legislative immunity arose to protect members of Parliament from coercion by the executive. *Tenney*, 341 U.S. at 372.

Public policy considerations strongly support legislative immunity. As demonstrated in Councilman Chema's main brief, legislative freedom is of vital importance in preserving the integrity of the legislative process, insuring legislative independence, thereby protecting the public good. *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 405 (1979).[7] As a local legislator, Councilman Chema is closer to his constituents than federal, state or regional legislators, acts on vital matters of local importance and is more vulnerable to litigation and its deterrent effects to the uninhibited discharge of his legislative duties. Councilman Chema "should be protected not only from the consequences of litigation's results but also from the burden of defending" himself. *Dombrowski v. Eastland*, 387 U.S. 82, 84 (1967). *See also Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 729, 734 (1980) (Virginia Supreme Court and its members, despite "their continued failure and . . . refusal to amend" the state bar code to conform with constitutional requirements set by this Court, were legislatively immune from declaratory and injunctive relief on such public policy grounds).

Legislative immunity, rooted in principles of federalism, comity and separation of powers, as well as history, also serves the salutary purpose of guarding against

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[7] The claims of the Government and NAACP that the District Court's orders did not interfere with Councilman Chema's legislative independence because his "discretion to act" or "independence of action" was already circumscribed by the court's orders, Government Brief, p. 32; NAACP Brief, p. 22, merely restate the issue. It is our fixed position that the District Court acted beyond its authority precisely because it senselessly interfered with Councilman Chema's independence and discretion.

undue federal interference with state legislative functions. *See Consumers Union*, 446 U.S. at 731-733. In ordering Councilman Chema to vote and how to vote, or face fine and imprisonment if he were to vote otherwise according to the dictates of his conscience and constituency, the District Court directly interfered with the most fundamental legislative functions, voting and zoning, and thereby violated our very system of representative government.[8] In ruling that Councilman Chema was absolutely and legislatively immune, this Court would reestablish the proper balance between the exercise of Article III power and the interests of democracy served by the independence of local legislators.[9]

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[8] To the extent that the Government and NAACP assert that Councilman Chema's vote was ministerial, and not legislative, Government Brief, p. 32, n. 42; NAACP Brief, pp. 21, 23, they are plainly wrong. Under the Court's functional inquiry test for legislative immunity, casting a vote is within the "sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 376; *Kilbourn*, 103 U.S. at 204. The power to enact a zoning ordinance is a state legislative function delegated to local legislative bodies by the New York State Legislature. *Kamhi v. Planning Bd. of Town of Yorkton*, 59 N.Y.2d 386, 389, 465 N.Y.S.2d 865, 866, 452 N.E.2d 1193, 1194 (1983).

Moreover, the Government's contention that legislative immunity should not apply to local legislators such as Councilman Chema because the Yonkers City Council exercises both legislative and executive powers is a red herring. Under the Court's functional inquiry test, particular functions, not particular offices, are relevant. Furthermore, the regional officials who were immune in *Lake Country Estates*, 440 U.S. at 394 (as acknowledged by Justice Blackmun in his dissent, 440 U.S. at 408), possessed both legislative and executive powers. Still further, the authority of the City Council "is legislative only." Charter of the City of Yonkers, Local Law No. 20-1961, Article III, § C3-1A.

[9] Contrary to the Government's contention that the Court of Appeals assumed that Councilman Chema was "entitled to

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Despite the many public policy considerations which support legislative immunity for Councilman Chema, the Government and NAACP claim that the "context of this case" dictate otherwise. Government Brief, pp. 29, 32-34; NAACP Brief, pp. 23-25. This amounts to no more than "transactional immunity," not absolute immunity, thus directly overruling *Tenney*. If legislative immunity depends on the willingness of legislators to "cooperate" with the federal judiciary, it is no immunity at all.

The Government, Government Brief, p. 33, concedes that the authority of federal courts to redress constitutional violations is subject to limitations arising from the Constitution. *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*); *Hills v. Gautreaux*, 425 U.S. 284 (1976). Indeed, as recognized by the ACLU/NYCLU in their *amicus* brief, ACLU/NYCLU Brief, pp. 18, 23, there exist "fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities. That power is not plenary." *Hills*, 425 U.S. at 293. Even when enforcing laudable guarantees of the Fourteenth Amendment, a district court must do so "in a manner that does not jeopardize the integrity of the structure or functions of state and local government." *Milliken v. Bradley*, 433 U.S. 267, 291 (1977) (*Milliken II*); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("No . . . judicial officer can war against the Constitution without violating his undertaking to support it"). Thus, "[t]he task is to correct, by a balancing of the *individual* and collective interests, the

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the same immunity available to state legislators," Government Brief, pp. 29-30, n. 38, the Court of Appeals, far from "assuming" the applicability of legislative immunity to Councilman Chema, denied such immunity *in toto*.

condition that offends the Constitution." *Swann*, 402 U.S. at 15 (emphasis added).[10]

Legislative immunity not only precludes the District Court's compelled legislative vote and the imposition of civil contempt sanctions against Councilman Chema, but also serves to restore the delicate balance of our revered form of representative government, further comity and preserve our federalism.

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[10] The pre-*Tenney* cases cited by the Government to deny legislative immunity to Councilman Chema, where federal courts issued writs of mandamus to compel local legislatures to satisfy federal court judgments entered after such local governments defaulted in their obligations to bondholders and where local legislators were held in contempt for refusing to comply with *valid* federal court orders, most of them occurring before the turn of the century, are inapposite. Government Brief, pp. 30-31. In none of those cases was the issue of legislative immunity ever discussed.

The Government also notes that this Court " 'has generally been quite sparing in its recognition of claims to absolute official immunity,' " Government Brief, p. 27, *citing Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538 (1988), but fails to realize this Court's acknowledgement in *Gravel v. United States*, 408 U.S. 606, 624 (1972) that "[p]rior cases have read the Speech or Debate Clause *'broadly* to effectuate its purposes' . . . and have included within its reach anything 'generally done in a session of the House by one of its members in relation to the business before it (emphasis added).' " Common-law immunity, "similar in origin and rationale" to the Speech or Debate Clause immunity, *Consumers Union*, 446 U.S. at 732, should likewise be read broadly in the instant case to effectuate its purposes.

Further, as explained in our main brief, *Griffin v. Co. School Bd.*, 377 U.S. 218 (1964) is of no help to the Government and NAACP. The portion of the *Griffin* opinion relied upon by the Court of Appeals is pure dictum. The Court cited no support for, nor engaged in any discussion of, this controversial proposition. The question of legislative immunity was also never discussed because the issue was not before the Court.

III. THE JULY 26, 1988 ORDER AND THE CONTEMPT JUDGMENT VIOLATED COUNCILMAN CHEMA'S FIRST AMENDMENT RIGHTS.

The ACLU and NYCLU in their *amicus* brief agree that Councilman Chema's legislative vote was a political statement protected by the First Amendment. ACLU/NYCLU Brief, pp. 12-13, 20-21. This certainly is not surprising since Councilman Chema's oral vote was both actual speech and symbolic speech as it expressed a particularized message that was likely to be understood by those who heard it. *See Texas v. Johnson*, ___ U.S. ___, ___ U.S.L.W. ___, No. 88-155, slip op. (June 21, 1989); *Spence v. Washington*, 418 U.S. 405 (1974).

A vote is speech protected by the First Amendment not because it involves an incidental spoken word, Government Brief, pp. 21, 41, but because it is the fundamental act of democracy. It is not merely a ministerial act such as issuing an order to a subordinate or executing a deed of conveyance, *Id.* at 41. Councilman Chema's vote was "core political speech" – the most highly protected form of speech – because it concerned political change. *See Meyer v. Grant*, ___ U.S. ___, 108 S. Ct. 1886, 1891-92 (1988).

The Government and the NAACP actually argue that legislators have fewer First Amendment rights than ordinary citizens and that they do not have the right to vote freely in the legislature to which they were duly elected. Government Brief, p. 39, NAACP Brief, pp. 27-29. The reason advanced for this astonishing proposition is that, in the cases heretofore decided by this Court involving attempts to constrain the speech of legislators, the Court relied upon legislative immunity and the separation of powers principle to uphold the legislator's right to vote. Legislative immunity and the First Amendment serve complementary purposes. Legislative immunity protects the institutional integrity of the legislative process, while

the First Amendment guarantees personal rights. There is no basis in law or logic for the Government's contention that a legislator is stripped of his fundamental right of free speech when he engages in his legislative activities. *See Connick v. Myers*, 461 U.S. 138, 147 (1983) ("citizens are not deprived of fundamental rights by virtue of working for the government"); *Pickering v. Bd. of Education*, 391 U.S. 563 (1968).[11]

Legislators can fulfill their responsibilities to their constituents only if they can exercise their right of free speech by voting as their consciences dictate. For a federal court to dictate to a local legislator how he shall vote is, in effect, to remove the local legislator from office for the purpose of that vote, and to replace him with an unelected federal judge. This would deprive the legislator's constituents of their fundamental right to choose their own representatives. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

The Government's argument that Councilman Chema was not compelled to speak because he could have resigned his office, Government Brief, pp. 41-42; NAACP Brief, p. 28, is also constitutionally unacceptable. A person cannot be forced to purchase his constitutional rights at the cost of incurring a crushing penalty. *See Connick*, 461 U.S. at 156 (Brennan, J., dissenting) ("the government may not constitutionally compel persons to relinquish their First Amendment rights as a condition of public employment").

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[11] The Government's contention that according First Amendment protection to a legislative vote would shield "resulting legislative enactments . . . from statutory and constitutional restraint," Government brief, p. 40, is sheer nonsense. A vote is protected whether or not legislation is enacted and, in the event of enactment, even if the vote was cast against enactment. The resulting legislation is always subject to challenge and judicial review.

The Government has not only failed to meet its almost "insurmountable" burden of supporting the District Court's restrictions on Councilman Chema's "core political speech," *Meyer v. Grant*, ___ U.S. at ___, 108 S. Ct. at 1894, but it now concedes that the less instrusive sanction against the City of Yonkers would have secured compliance, Government Brief, n. 55. Therefore, the District Court's restrictions on Councilman Chema's rights to speak and vote were unjustified.

IV. THE DISTRICT COURT DID NOT HAVE AUTHORITY TO ENFORCE THE CONSENT DECREE AGAINST COUNCILMAN CHEMA.

The District Court did not have power to enforce the Consent Decree against Councilman Chema because he was not a party to the Decree nor in privity with a party to it. *Martin v. Wilks*, ___ U.S. ___, 57 U.S.L.W. 4616, 4619 (June 12, 1989), *quoting Local Number 93, International Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986).[12]

Contrary to its argument in *Martin*, the Government now contends that the Consent Decree bound Councilman Chema even though he was neither a party nor a privy.[13] The Government relies almost entirely upon the

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[12] This principle is so well-established that in *Martin* the Government wholeheartedly advocated it. The Government argued, "It is a fundamental principle of due process that a judgment may not be held binding on a litigant who was neither party nor privy to the litigation in which that judgment was entered." Brief for the Government at 9, filed in *Martin v. Wilks*, ___ U.S. ___, 57 U.S.L.W. 4616 (June 12, 1989).

[13] Respondents repeatedly argue that the collective assent of the Council was enough to give the Consent Decree legal force. Yet, the District Court's adoption of the Consent Decree displays yet another example of the insular exercise of its

(Continued on following page)

use of the term "officers" in Fed. R. Civ. P. 65(d) for its present contention. Government Brief, pp. 22-23; *see also* NAACP Brief, p. 17; ACLU/NYCLU Brief, p. 30. This reliance is misplaced. Elected legislators are not "officers" within the meaning of Rule 65(d). The purpose of Rule 65(d), which rule applies only to injunctions and restraining orders, not to judgments, is to prevent a party from

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authority, because notice was not given to all class members before the District Court approved it. The Consent Decree was constitutionally infirm.

Rule 23(e) mandates that before any class action is settled, notice be given to all class members. Fed. R. Civ. P. 23(e). The notice provision of Rule 23(e) is "of constitutional significance and must be viewed in due process terms." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814 (1985). The notice must, therefore, " 'afford a reasonable time for those interested to make their appearance' " and file objections. *Weinberger v. Kendrick*, 698 F.2d 61, 71 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) *quoting, Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Here, the affected community was not given notice and a reasonable opportunity to be heard. Even the black community was not given a voice before the District Court. Appendix pp. 186, 201-202. On January 28, 1988, counsel for the NAACP argued (and the Government and the District Court accepted) that although there were "dissident voices" in the community, it was "premature to schedule that [fairness] hearing or to publish anything." Appendix pp. 211, 214. No notice was ever given, nor any hearing ever held with respect to the Consent Decree.

This highhandedness makes the District Court's deprivation of Councilman Chema's rights all the more significant. Since the District Court would not listen to the community directly, Councilman Chema's vote represented the only way in which his constituents' interests in decent housing could be voiced. Deprivation of fundamental individual rights should not turn on a decree of such dubious validity. Resort to the contempt power to enforce the Consent Decree was premature to say the least.

nullifying such orders by carrying out a prohibited act through someone under its control. *Regal Knitwear Co. v. National Labor Relations Bd.*, 324 U.S. 9, 14 (1944). Thus, all persons controlled by or in privity with a party – "officers, agents, servants, employees, and attorneys," and persons acting in concert – are bound under the rule to obey an injunction. It follows that a person is an "officer" of a party within the meaning of Rule 65(d) only if the party controls or is in privity with him.

In contrast to the subordinate persons covered by Rule 65(d), Councilman Chema is an elected representative answerable to only his constituents. Neither the Council nor the City can direct him how to vote. Councilman Chema is not a Rule 65(d) officer because of his separate and independent legal status vis-à-vis the City.[14]

No rule of procedure nor, indeed, any theory of inherent judicial authority to enforce judgments, can impair fundamental constitutional rights and historic immunities. *See Hanna v. Plumer*, 380 U.S. 460, 471 (1965); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445-46 (1945). Rule 65(d) does not alter the principle that legislators are not subject to injunctions for purely legislative acts, nor can it act to deprive any citizen of First Amendment rights.

In *Delaware Valley Citizens v. Commonwealth of Pa.*, 678 F.2d 470 (3d Cir.), *cert. denied*, 459 U.S. 969 (1982), the court did not hold that any individual legislator was bound by the consent decree to vote against the funding moratorium or to vote to repeal it, but instead held the

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[14] Rule 65(d) "officers" are not the same as "local officers" under New York Pub. Off. L. § 2. "Officers" under Pub. Off. L. § 2 exercise some sovereign power and have discretion as to the mode of performing their duties. *Haller v. Carlson*, 42 A.D.2d 829, 346 N.Y.S.2d 108, 109 (4th Dep't 1973); *Application of Sweeney*, 1 Misc. 2d 125, 128, 147 N.Y.S.2d 612, 615 (Clinton Co. Sup. Ct. 1955). They are not the ministerial functionaries that Rule 65(d) contemplates.

Commonwealth of Pennsylvania in civil contempt, rejecting the state's contention that it could not be held responsible for actions of the legislature because the legislature was not a party. 678 F.2d at 472-76.

United States v. Fleischman, 339 U.S. 349, *reh'g denied*, 339 U.S. 991 (1950) does not support respondents' position that the collective vote of the Council may bind councilmen to the Consent Decree. Government Brief, p. 26. In *Fleischman*, the Court sustained the conviction of a member of the executive board of the Joint Anti-Fascist Refugee Committee for contempt of Congress in refusing to obey a Congressional subpoena, reasoning that as a holder of an office of joint responsibility, the defendant had an individual responsibility to authorize compliance with the subpoena. *Id.* at 355-57. The Court emphasized that its holding followed from the well-established rule that directors of corporations are responsible for taking appropriate action to comply with court orders directed at the corporation. *Id.* at 357-358. That case did not involve the First Amendment, legislative immunity, principles of federalism, separation of powers and judicial authority concerns present here.

V. THE DISTRICT COURT'S JULY 26, 1988 ORDER IMPROPERLY MODIFIED THE CONSENT DECREE BY REMOVING FROM THE COUNCIL THE RIGHT TO CONSIDER THE ZONING CHANGES' IMPACT.

The claim that the Ordinance was consistent with the Consent Decree because the Council retained authority to meet the zoning incentive needs of developers, NAACP Brief, p. 30, misses the point completely. The Consent Decree abolished the Council's discretion to consider the effect of zoning changes on the neighborhood, not because of any change in the Council's ability to approve

development incentives.[15] *Compare* Appendix p. 222 *with* Appendix pp. 549-56.

The Government's contention that the Ordinance was consistent with the Consent Decree because *some* entity retained authority to consider the impact of zoning changes, Government Brief, p. 25, also misses the point. The Ordinance fundamentally altered the Consent Decree because it shifted this authority from the Council to the Office of Implementation and the Planning Board.

CONCLUSION

For the reasons stated above and in the Brief for Petitioner, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Dated: New York, New York
July 12, 1989

Respectfully submitted,
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[15] Councilman Chema had no opportunity to raise this claim in the District Court because he was not a party to the underlying suit. In the contempt proceeding, he was given inadequate time to prepare a defense, 856 F.2d at 452-53, and so was again unable to raise the issue. The claim was raised in oral argument before the Court of Appeals. Finally, the claim directly rebuts the arguments of the Government and the NAACP that the principle of legislative immunity has no application because the councilmen had no discretion to act. Government Brief, p. 32; NAACP Brief, p. 22.